

# *The international law of unconventional statecraft*

Article

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## ARTICLE

## The International Law of Unconventional Statecraft

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## Introduction

The wars in Iraq and Afghanistan will cost the United States four to six trillion dollars.<sup>1</sup> Add to this figure the outlays of the international community, and former U.S. Secretary of State Colin Powell's cautionary maxim that if "you break it, you own it" resonates with particular clarity.<sup>2</sup> Upon reflection, the net national security benefits of regime change and nation-building through direct military campaigns appear somewhat dubious, if only from a fiscal standpoint.

Beyond the daunting costs, classic direct military operations often prove less successful than indirect ones at producing desired long-term results.<sup>3</sup> Although direct operations may disrupt or neutralize immediate

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<sup>1</sup> Linda J. Bilmes, *The Financial Legacy of Iraq and Afghanistan: How Wartime Spending Decisions Will Constrain Future National Security Budgets*, HARVARD KENNEDY SCHOOL FACULTY RESEARCH WORKING PAPER SERIES (Mar. 2013), <https://research.hks.harvard.edu/publications/getFile.aspx?Id=923> [http://perma.cc/J2KD-WMYK].

<sup>2</sup> BOB WOODWARD, *PLAN OF ATTACK* 150 (2004).

<sup>3</sup> Linda Robinson, *The Future of Special Operations: Beyond Kill and Capture*, FOREIGN AFFAIRS, Nov./Dec. 2013, at 110, 112. Direct military operations involve the sending of one's own forces to another country to accomplish a mission. Indirect refers to operations

threats, the ensuing consequences can be disruptive and destabilizing. As current events in Iraq and Afghanistan aptly demonstrate, lasting stability is usually only possible when indigenous government institutions and security forces mature to a point where they can provide internal security without foreign assistance.

Since at least the rise of the modern nation-state, states have thus availed themselves of opportunities to achieve national security objectives through support of proxy forces within the territory of hostile or unfriendly states.<sup>4</sup> In past centuries, such activities were a common and accepted foreign policy tool, although states often kept their undertakings quiet for diplomatic, financial, or other reasons. Once states outlawed the use of coercive force in the twentieth century, support of foreign insurgencies tended to move underground.<sup>5</sup>

But the utility of these operations continues to be recognized. As the Commander of U.S. Special Operations Command, Admiral William McRaven, has pointed out in testimony before the U.S. Congress, “the direct approach . . . only buys time and space for the indirect approach . . . [and] in the end, it will be such continuous indirect operations that will prove decisive in the global security arena.”<sup>6</sup> It is no surprise, then, that

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in which another country invites the state to provide advice and assistance to its security forces.

<sup>4</sup> See, e.g., MAX BOOT, *INVISIBLE ARMIES: AN EPIC HISTORY OF GUERRILLA WARFARE FROM ANCIENT TIMES TO THE PRESENT* (2013). Boot’s seminal work on guerrilla warfare—a typical tool of insurgencies—concludes that guerrilla warfare was the norm (it was “conventional” warfare) throughout ancient history until the rise of the first “genuine armies” in Egypt and Mesopotamia after 3100 BC. *Id.* at 8–12. Foreign support of insurgent guerrillas became a common foreign policy tool with the rise of the post-Westphalian nation-state and the liberal revolutions that began in the 1700s. See *id.*, at 59–63. Boot finds “outside assistance—whether in the form of arms supplies and safe havens or, even better, the provision of conventional forces to operate in conjunction with guerrillas—has been one of the most important factors in the success of insurgent campaigns.” See *id.*, at xxvi.

<sup>5</sup> General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact of Paris), 94 L.N.T.S. 57 (1928); U.N. Charter art. 2(4). For a historical survey of insurgencies, including foreign support thereof, in the twenty years following the signing of the U.N. Charter, see MICHAEL BURLEIGH, *SMALL WARS, FARAWAY PLACES: GLOBAL INSURRECTION AND THE MAKING OF THE MODERN WORLD, 1945–1965* (2013).

<sup>6</sup> William H. McRaven, United States Special Operations Command, Posture Statement of Admiral William H. McRaven, USN, Commander, United States Special Operations Command, presented to the 112th Congress, Senate Armed Services Committee (Mar. 6, 2012), <http://www.armed-services.senate.gov/imo/media/doc/McRaven%2003-06-12.pdf> [<http://perma.cc/3ATU-XW94>].

President Barack Obama has sought to accomplish U.S. national security objectives, including regime change, through less than direct approaches to statecraft. In Libya, for instance, the United States and NATO combined direct (i.e., overt military operations) with indirect (i.e., covert support for rebel groups) operations to bring about regime change at a cost of less than two billion dollars.<sup>7</sup>

Indirect operations may be conducted either conventionally or unconventionally. In the security context, conventional indirect operations typically involve assistance to a friendly government struggling to maintain or secure control over its territory and population. The operations are considered “conventional” because they involve government-to-government activities; they are indirect in the sense that one government is advising and assisting another’s security efforts, rather than taking action itself.<sup>8</sup> Prime examples include U.S. military operations to build and support Iraqi and Afghan security forces engaged in counterinsurgency operations.

Unconventional indirect activities, by contrast, consist of intelligence operatives or special operations forces working with rebel or insurgent forces *against* another government.<sup>9</sup> As state support for foreign insurgencies and insurrections was driven underground by evolving international norms during the twentieth century, adjectives like dirty, secret, small, limited, irregular, covert, and unconventional were added to the term “war” to refer to these operations.<sup>10</sup> The U.S. military labels them

<sup>7</sup> CHRISTOPHER M. BLANCHARD, CONG. RESEARCH SERV., LIBYA: TRANSITION AND U.S. POLICY 26 (Oct. 18, 2012). *See also* estimate by U.S. Vice President Joseph Biden *quoted in* Tom Cohen, *Obama Pledges U.S. Support for Libya after Gadhafi*, CNN (Oct. 20, 2011), <http://www.cnn.com/2011/10/20/us/gadhafi-reaction/> [<http://perma.cc/5NA8-M4R8>]. It must be cautioned that the circumstances in Libya were rather unique. In particular, the rebel groups were unusually well organized and equipped, and the NATO military action was expressly authorized by the UN Security Council—two key factors unlikely to be seen again for some time.

<sup>8</sup> In U.S. military parlance, an operation in which an indigenous government force is trained, equipped, organized, and supported “to free and protect its society from subversion, lawlessness, insurgency, terrorism, and other threats to its security” is labeled “foreign internal defense.” JOINT CHIEFS OF STAFF, JOINT PUBLICATION 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS, Nov. 8 2010, as amended through Oct. 15, 2013, [http://www.dtic.mil/doctrine/new\\_pubs/jp1\\_02.pdf](http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf) [<http://perma.cc/JPG7-NV3M>] [hereinafter JP 1-02].

<sup>9</sup> For more on the conventional-unconventional distinction, see Andru E. Wall, *Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities & Covert Action*, 3 HARV. NAT’L SEC. J. 85, 110–14 (2011).

<sup>10</sup> *See generally* PETER HARCLERODE, *FIGHTING DIRTY* (2001); JOHN J. TIERNEY, JR., *CHASING GHOSTS: UNCONVENTIONAL WARFARE IN AMERICAN HISTORY* (2006); MAX

“unconventional warfare,” which it defines as “[a]ctivities conducted to enable a resistance movement or insurgency to coerce, disrupt, or overthrow a government or occupying power by operating through or with an underground, auxiliary, and guerrilla force in a denied area.”<sup>11</sup>

This Article examines the international law issues raised by “unconventional statecraft,” a term the Article adopts, as explained *infra*, in lieu of “unconventional warfare.” It questions whether, and if so when, foreign support to insurgents runs afoul of international legal norms designed to safeguard the sovereign prerogatives of other states. In this regard, it must be cautioned that the article assesses unconventional statecraft solely from the perspective of international law. Other normative restrictions on unconventional statecraft reside in the domestic legal regime, but are not addressed. It must also be cautioned that the authors recognize that because international law norms are usually backward-looking in the sense of responding to past events, there may be circumstances in which the law proves ill-suited in the face of contemporary threats. In such cases, national decision-makers may be compelled to authorize covert support to rebel forces because doing so is in the national or international interest and therefore legitimate, albeit unlawful. Of course, decisions to venture beyond the limits of international law described in this Article should be extremely rare.

### I. Unconventional Statecraft

The term “unconventional statecraft” is employed in this Article to refer to external support by one state to insurgents in another. It has particular resonance when the two states concerned are not involved in an international armed conflict.<sup>12</sup> Consider the case of a state that is assisting insurgent forces in hopes of toppling an unfriendly government. The state is not presently engaged in an international armed conflict with the target state and does not intend to provide any support that would trigger an armed conflict as a matter of law. To label the first state’s activities “unconventional warfare” would misconstrue the situation through use of

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BOOT, THE SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER (2002).

<sup>11</sup> JP 1-02, *supra* note 8, at 283.

<sup>12</sup> The term “international armed conflict” refers to a conflict between two or more states, as distinct from a non-international armed conflict, which involves hostilities at a significant level that take place between a state and a non-state armed group, or between two non-state groups. See Common Articles 2 & 3 to the four Geneva Conventions.

the highly pejorative term “warfare” and suggest that the governing legal regime is necessarily the law of armed conflict.<sup>13</sup>

“Statecraft,” defined as the “art of conducting State affairs,”<sup>14</sup> accurately describes such activities regardless of whether they occur outside or within the context of an armed conflict. Statecraft encompasses all national resources that are available to achieve national objectives (e.g., diplomatic, economic, communications, intelligence, and military means). Effectively exercised, statecraft “identifies the things that are important and frames objectives and purposes in a way that others can accept; employs extensive communication channels to build understanding and to reduce the possibility for misperceptions; and uses all available assets to promote national interests and to counter real and potential threats.”<sup>15</sup>

“Unconventional” statecraft, then, refers to activities designed to coerce, disrupt, or overthrow a government or occupying power by operating with or through a resistance movement or insurgency in a denied area.<sup>16</sup> It can include, *inter alia*, diplomatic, economic, information, intelligence, or military support and can occur during peacetime or in an ongoing non-international or international armed conflict. The insurgents may be waging an independent campaign against the government, or they may be agents of the state providing the assistance. Whatever the case, the art of unconventional statecraft is to develop and sustain the insurgency’s indigenous capabilities and channel them in ways that foster the national security objectives of the state engaging in unconventional statecraft.

## II. Unconventional Statecraft and Intervention

The international law principle of non-intervention prohibits states from using coercive means to intervene in the internal or external affairs of other states.<sup>17</sup> Stemming from the principle of sovereignty,<sup>18</sup> this prohibition

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<sup>13</sup> The law of armed conflict only applies once an international or non-international armed conflict commences. Otherwise, operations are governed principally by international human rights law and domestic law. The existence of an armed conflict between two states also has significant implications for the laws of sovereignty and of state responsibility.

<sup>14</sup> DAVID A. BALDWIN, *ECONOMIC STATECRAFT* 8 (1985).

<sup>15</sup> Dennis Ross, *Remember Statecraft?*, THE AMERICAN SCHOLAR (Summer 2007), <http://theamericanscholar.org/remember-statecraft/> [<http://perma.cc/YQ7M-ES5Y>].

<sup>16</sup> A denied area is “[a]n area under enemy or unfriendly control in which friendly forces cannot expect to operate successfully within existing operational constraints and force capabilities.” JP 1-02, *supra* note 8, at 704.

<sup>17</sup> Article 2(7) of the UN Charter is often mistakenly referred to as a codification of the prohibition. It is not. The non-intervention principle applies to intervention by one state

has been recognized by the International Court of Justice (ICJ) as a fundamental norm of customary international law.<sup>19</sup> Most states, including the United States, accept the principle as a binding aspect of international law,<sup>20</sup> a view echoed by such august bodies as the International Law Commission.<sup>21</sup>

The key to the prohibition is the requirement of coercion.<sup>22</sup> States often take actions designed to influence other states, the classic example being diplomacy. However, an act is only coercive when it is intended to compel another state to behave in a manner other than how it normally would, or to refrain from taking an action it would otherwise take. Persuasion or propaganda does not qualify, nor do actions that merely affect another state's decision-making processes, such as cutting off trade with the target state.

While the line between lawful actions and unlawful intervention is indistinct, the ICJ held in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua)* that "financial support, training, supply of weapons, intelligence and logistic support" amount to intervention.<sup>23</sup> Similarly, in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation, the U.N. General Assembly stated that organizing, instigating, assisting, financing, or participating in acts of civil strife or terrorist acts in another state, or "acquiescing in organized activities within its territory directed towards the commission of such acts," constituted unlawful intervention.<sup>24</sup> The ICJ later characterized this

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into the affairs of another. Article 2(7) addresses intervention by the United Nations. U.N. Charter art. 2(7).

<sup>18</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶¶ 205, 251 (June 27) [hereinafter *Nicaragua*].

<sup>19</sup> *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 35 (Apr. 9); *Nicaragua*, *supra* note 18, at ¶ 202; *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, ¶¶ 161–63 (Dec. 19) [hereinafter *Armed Activities*].

<sup>20</sup> *See, e.g.*, U.S. State Department, Special Briefing, Secretary Clinton's Meeting with Colombian Foreign Minister Jaime Bermudez (Aug. 18, 2009), <http://www.state.gov/r/pa/prs/ps/2009/aug/128079.htm> [<http://perma.cc/EQ83-N5TL>].

<sup>21</sup> *See, e.g.*, Draft Declaration on Rights and Duties of States art. 3, G.A. Res. 375, U.N. Doc. A/RES/375(IV) (Dec. 6, 1949).

<sup>22</sup> *See Nicaragua*, *supra* note 18, at ¶ 205.

<sup>23</sup> *Id.* ¶ 228.

<sup>24</sup> Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/RES/8082 (Oct. 24, 1970).



statement as accurately reflecting customary international law.<sup>25</sup> Thus, it appears that many forms of unconventional statecraft qualify as intervention as a matter of law.

Although there seems to be consensus as to the existence of a principle of non-intervention, it is equally apparent that it has been seen more in the breach than the observance. As Professor Oscar Schachter observed nearly thirty years ago:

Foreign military interventions in civil wars have been so common in our day that the proclaimed rule of non-intervention may seem to have stood on its head. Talleyrand's cynical quip comes to mind: "non-intervention is a word that has the same meaning as intervention."<sup>26</sup>

Along the same lines, Professor John Norton Moore has referred to a "fundamental ambivalence toward intervention which has rendered traditional norms of limited utility."<sup>27</sup> States that "vehemently oppose intervention when it proceeds against their interests" will favor external assistance to governments or opposition groups aligned with those states' national interests.<sup>28</sup>

Such common concerns were addressed head-on in *Nicaragua* by the ICJ. There, the Court cautioned that "[i]t is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs."<sup>29</sup> The Court went on to point out that "[e]xpressions of an *opinio juris* regarding the existence of the principle of non-intervention in customary international law are numerous and not difficult to find."<sup>30</sup>

Whether the principle of non-intervention has substantive import or is essentially hortatory in nature (the authors differ on this point), it is apparent that assessments of intervention are inherently contextual and

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<sup>25</sup> *Nicaragua*, *supra* note 18, at ¶ 264; *Armed Activities*, *supra* note 19, at ¶ 162.

<sup>26</sup> Oscar Schachter, *International Law in Theory and Practice*, 178 RECUEIL DES COURS 160 (1982).

<sup>27</sup> John Norton Moore, *Introduction*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* xiv (John Norton Moore ed., 1974).

<sup>28</sup> *Id.*

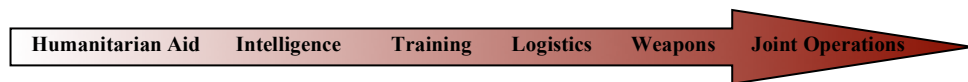
<sup>29</sup> *Nicaragua*, *supra* note 18, at ¶ 186.

<sup>30</sup> *Id.* ¶ 202.

value-driven, thereby rendering precise normative standards elusive. States that engage in unconventional statecraft that might violate the prohibition on intervention must necessarily weigh the possible costs of such charges against any potential advancement of the national interests at stake.

### III. Unconventional Statecraft and the Use of Force

The salient questions in the context of this Article are: (1) when does unconventional statecraft violate international law's prohibition on the use of force, and (2) when does unconventional statecraft constitute an armed attack such that it triggers the right of self-defense on the part of the target state?<sup>31</sup> There is no stock answer, for unconventional statecraft activities vary widely. Therefore, following a brief summary of the applicable normative framework, the spectrum of unconventional statecraft depicted in Figure 1 will frame the analysis.



**Fig. 1 Spectrum of Support for Rebels**

<sup>31</sup> The ICJ has recognized two conditions for the exercise of the right of self-defense—necessity and proportionality. *Nicaragua*, *supra* note 18, at ¶¶ 176, 194; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 41 (July 8); *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, ¶¶ 43, 73–74, 76 (Nov. 6). Necessity requires that non-forceful means be unavailable to reliably put an end to the situation justifying defensive actions. Proportionality requires that whatever force is employed to do so be no more than needed to achieve that end. A third criterion is imminence, which requires defensive uses of force be taken in the face of a prospective armed attack only when the opportunity to defend oneself is about to evaporate. The obligation derives in part from the correspondence regarding the *Caroline* incident. Letter from Mr. Webster to Mr. Fox (Apr. 24, 1841), 29 BRITISH AND FOREIGN STATE PAPERS 1129 (1840–41). On the requirements, see Michael N. Schmitt, *Responding to Transnational Terrorism under the Jus ad Bellum: A Normative Framework*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 157 (Michael N. Schmitt & Jelena Pejic eds., 2007). The U.S. government has adopted the standard. See, e.g., U.S. Department of Justice White Paper, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa’ida or an Associated Force*, Draft, at 7 (Nov. 8, 2011), [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf) [<http://perma.cc/ES6D-Y3GH>].

### A. The Normative Framework

Universal agreement exists regarding the most egregious form of intervention, an unlawful use of force. Accordingly, unconventional statecraft involving support to rebel or other armed groups in another state is perhaps most often assessed in the context of the international regulation of coercive force.

The United Nations Charter ushered out the last vestiges of the traditional normative paradigm whereby states were generally free to resolve disputes by force, and introduced a legal system premised on collective security rather than self-help.<sup>32</sup> The cornerstone of this modern *jus ad bellum* is Article 2, paragraph 4, of the Charter. It provides that “[a]ll Members [of the United Nations] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” The article reflects customary law and is generally considered a *jus cogens* norm, that is, one from which no deviation is permitted.<sup>33</sup>

Unfortunately, the Charter does not define the term “use of force,” nor does the text of Article 2(4) add granularity to the concept. The context, *travaux préparatoires*, and subsequent treatment, however, leave little question that the Charter banned armed force, while lesser forms of coercion, such as economic or psychological coercion, were not outlawed.<sup>34</sup> Nevertheless, questions remain as to what exactly is prohibited. This uncertainty is particularly relevant in the context of unconventional statecraft.

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<sup>32</sup> In the scheme envisioned by the Charter’s drafters, the Security Council would enforce the prohibition using a standing military force to guarantee the collective security of the international community. See U.N. Charter arts. 43–47. No state has ever seconded its troops. Rather, collective security is guaranteed by states—occasionally through regional organizations—acting ad hoc and volitionally in individual or collective self-defense. For the historical development of the prohibition on the use of force, see YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 65–87 (5th ed. 2012); Albrecht Randelzhofer & Oliver Dörr, *Article 2(4)*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY I, 200, 204–07 (Bruno Simma et al. eds., 3d ed. 2012).

<sup>33</sup> See, e.g., *Nicaragua*, *supra* note 18, at ¶ 190 (citing the International Law Commission’s commentary to Article 50 of its draft Articles on the Law of Treaties, 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 247 (1966), A/CN.4/SER.A/1966/Add.1).

<sup>34</sup> DINSTEIN, *supra* note 32, at 88; Randelzhofer & Dörr, *supra* note 32, at 208–10.

There are two exceptions to the prohibition on the use of force. First, a use of force authorized or mandated by the Security Council pursuant to its Chapter VII authority does not violate Article 2(4).<sup>35</sup> While the likelihood of the Security Council's authorizing unconventional statecraft is low, the possibility is plausible. For instance, it might authorize the arming of insurgent forces fighting an oppressive and illegitimate regime engaged in widespread human rights abuses. Any such authorization would preclude characterization of the actions as a wrongful use of force.

Of greater significance in the context of unconventional statecraft is the second exception. While Article 2(4) outlaws the right of states to use military force to resolve interstate disputes, Article 51 preserves their "inherent right" to use force in individual or collective self-defense:

Nothing in this present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to restore international peace and security.<sup>36</sup>

Like "use of force," the Charter left the term "armed attack" undefined. The two phrases have resultantly generated much debate among practitioners and in the academy over the years.<sup>37</sup> With nearly seventy years of interpretative state practice to consider, the original intent of the drafters is of diminishing interest.<sup>38</sup> *Opinio juris sive necessitatis*—the practice of states coupled with a belief that the practice was required by or consistent with international law—reflects a broad interpretation of the concept of armed attack. Since the inception of the UN Charter, states have defended most unilateral uses of force as legitimate acts of self-defense in response to armed attacks.<sup>39</sup> This has been the case regardless of whether the attack in

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<sup>35</sup> U.N. Charter art. 42.

<sup>36</sup> U.N. Charter, art. 51.

<sup>37</sup> See, e.g., Hans Kelsen, *Collective Security and Collective Self-Defense under the Charter of the United Nations*, 42 AM. J. INT'L L. 783, 792 (1948); DAVID W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 182–93 (1958); Nicholas Rostow, *The International Use of Force after the Cold War*, 32 HARV. INT'L L.J. 411, 420 (1991); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 273–75 (1963).

<sup>38</sup> Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331; see REIN MÜLLERSON, ORDERING ANARCHY: INTERNATIONAL LAW IN INTERNATIONAL SOCIETY 310 (2000) ("International law of the year 2000 cannot be the same as international law of 1945.").

<sup>39</sup> Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT'L L. 259, 259 (1989).

question was in response to an armed strike by military forces, occurred on its own territory, or was carried out by state or non-state actors.

The Charter's recognition of the right to use force in self-defense against an "armed attack" raises the question of whether all uses of force are armed attacks. Put another way, does an illegal use of force—i.e., a use of force not in self-defense or pursuant to a Security Council resolution—necessarily constitute an armed attack, or is a degree of magnitude required for a use of force to be classified as an armed attack? Both logic and pragmatism dictate that any "gap between Article 2(4) ('use of force') and Article 51 ('armed attack') ought to be no more than a hiatus."<sup>40</sup> If the Article 51 magnitude were significantly higher than that of Article 2(4), as opponents of military action often assert, then one state could carry out low-intensity uses of force against another and the latter would be limited in its response by Article 2(4) to only non-forcible responses, such as countermeasures.<sup>41</sup> The view that the gap is large is without support in state practice.<sup>42</sup>

The question remains, however, whether any gap exists at all. In *Nicaragua*, the ICJ looked to customary international law to differentiate the terms. The ICJ noted at the outset that "it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms."<sup>43</sup> Quoting the UN General Assembly resolution defining "aggression," which, in its view, "may be taken to reflect customary international law," the Court stated that armed attack included

not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (inter alia) an actual armed attack conducted by regular forces . . . . The Court sees no reason to deny that, in customary law, the

<sup>40</sup> DINSTEIN, *supra* note 32, at 208.

<sup>41</sup> *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 22, Rep. of the Int'l L. Comm'n, 53d Sess., U.N. Doc. A/56/10, GAOR 56th Sess., Supp. No. 10 (2001), reprinted in 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 32 (2001), U.N. Doc. A/CN.4/SER.A/2001/Add.1 [hereinafter *Articles on State Responsibility*].

<sup>42</sup> See, e.g., Claude H. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 451, 496 (1952) (arguing that it misreads the entire intention of Article 51 to interpret it as implicitly "forbidding forcible self-defence in resistance to an illegal use of force not constituting an armed attack").

<sup>43</sup> *Nicaragua*, *supra* note 18, at ¶ 191.

prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.<sup>44</sup>

The ICJ then opined that it did not believe that “assistance to rebels in the form of the provision of weapons or logistical or other support” was included within “the concept of ‘armed attack,’ [although it] may be regarded as a threat or use of force . . . .”<sup>45</sup>

Since *Nicaragua*, the United States has rejected the premise of a gap between the use of force and armed attack thresholds. As an illustration, in late 2012, the State Department’s Legal Adviser stated, “the inherent right of self-defense potentially applies against any illegal use of force. In our view, there is no threshold for a use of deadly force to qualify as an ‘armed attack’ that may warrant a forcible response.”<sup>46</sup> This position represents the minority view in the international law community, even though, as noted, in practice States tend to justify most uses of force based on self-defense.<sup>47</sup> The authors differ in whether a gap exists as a matter of law, but concur that if it does it is certainly narrow and has historically enjoyed little practical relevance.

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<sup>44</sup> *Id.* ¶ 195.

<sup>45</sup> *Id.* It is impossible to divorce the ICJ’s finding from its political context. Arguably, if the ICJ had found that providing arms to rebels in another country always amounts to an armed attack, then many of the U.S. actions in support of the Contras would have been justified as acts of collective self-defense (leaving aside the issue of a request). By denying that provisions of arms to rebels necessarily amounts to an armed attack, the ICJ restricted the permissible responses to “countermeasures”—“a tautological rationale that enabled it to deny the right of joint action.” Abraham D. Sofaer, *International Law and the Use of Force* (Luncheon Address), 82 AM. SOC’Y INT’L L. PROC. 420, 425 (1988); see *Nicaragua*, *supra* note 18, at ¶ 211 (“States do not have a right of ‘collective’ armed response to acts which do not constitute an ‘armed attack.’”).

<sup>46</sup> Harold H. Koh, International Law in Cyberspace, Address at the USCYBERCOM Inter-Agency Legal Conference, Ft. Meade, Maryland (Sept. 18, 2012), *reprinted in* 54 HARV. INT’L L.J. ONLINE 1, 3 (2012); see William H. Taft IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. INT’L L. 295, 299–302 (2004); Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 93–96 (1989).

<sup>47</sup> See, e.g., TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 47, 55 (Michael N. Schmitt ed., 2013).

*B. Humanitarian Aid and Intelligence Activities*

Humanitarian aid and intelligence are often the starting point for building a relationship between a state and the insurgents it supports. Depending on the country and extent of any preexisting relationship, intelligence operatives and special operations forces typically establish contacts with insurgent leaders and begin discussing possible collaboration in pursuit of mutual objectives; this frequently occurs in neighboring countries. The provision of humanitarian assistance such as food and medical supplies and the sharing of intelligence are often effective means of establishing rapport with insurgents.<sup>48</sup> Such a relationship is essential in “persuading and leading irregular surrogates to act in concert with U.S. objectives [and] is a human political interaction that is inherently difficult to control.”<sup>49</sup>

There can be little question that humanitarian aid (including food, medical supplies, tents and other temporary shelters, non-military vehicles, and communications equipment) does not amount to an unlawful use of force. The ICJ has held that “the mere supply of funds . . . does not in itself amount to a use of force,” even when used to support an insurgency generally.<sup>50</sup> It would clearly be incongruent to nevertheless style the in-kind provision of humanitarian aid as a use of force. However, although it may not amount to a use of force, the ICJ has suggested that an essential element of humanitarian assistance is that it can be distributed “without discrimination” consistent with principles espoused by the International Conference of the Red Cross.<sup>51</sup> In its view, humanitarian assistance delivered or made available only to rebels (as opposed to the larger population) in another country would violate the principle of non-intervention.<sup>52</sup> And the non-consensual penetration of another state’s territory to deliver any aid *in situ* would in traditional international law

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<sup>48</sup> Typically, U.S. forces collect intelligence to assess the capabilities and intentions of both the insurgent and indigenous government forces. Department of Army, FM 3-05.201, Special Forces Unconventional Warfare Operations, ¶¶ 1–7 (Apr. 2003). In many cases, the activities include paying insurgents for information about local political leaders or security personnel—a mutually beneficial activity that gives the supporting government’s forces important information, while also providing (minimal) financial support to individual (or collective) insurgent leaders and participants.

<sup>49</sup> Department of the Army, FM 3-05.130, Army Special Forces Unconventional Warfare, ¶¶ 3–44 (Sept. 2008).

<sup>50</sup> *Nicaragua*, *supra* note 18, at ¶ 228.

<sup>51</sup> *Id.* ¶¶ 242–43.

<sup>52</sup> *Id.* ¶ 243.

terms amount to a violation of sovereignty in the form of a breach of territorial integrity.<sup>53</sup>

It is well accepted that espionage is not, in itself, a breach of international law.<sup>54</sup> Indeed, although typically a violation of domestic law, states widely engage in intelligence collection. Of course, depending on their purpose, intelligence operations may constitute an intervention. For instance, providing rebels with targeting intelligence that directly facilitates attacks would clearly qualify as coercive and therefore amount to use of force. States may also view “aid to a force opposing the government as a violation of the sovereignty and independence of the State.”<sup>55</sup> However, the act of gathering intelligence does not comprise a use of force and accordingly could not qualify as an armed attack thereby opening the door to a forceful response.

### *C. Training, Logistics, and Arms*

As rapport is established with the insurgents, support typically expands to training, organizational assistance, logistics support, and, sometimes, the provision of arms. If supporting forces do not have access to the areas where the insurgents operate, these activities may take place in a third country, often a neighboring state or a regional ally. Training and organizational assistance can include such areas as leadership, organizational structure and operation, communications, intelligence gathering, planning and executing political activities, influence operations, and planning and executing direct action such as sabotage and guerrilla operations.

As insurgent capabilities are slowly built, the supporting government's forces may begin conducting unconventional activities of their own beyond intelligence collection, especially information operations such as subversion. Subversion, as the name implies, consists of operations designed to undermine the morale of a regime; they are necessarily clandestine and may be performed by the supporting government forces or insurgents trained to conduct them.<sup>56</sup> Subversion includes efforts to weaken

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<sup>53</sup> The classic expression of sovereignty is *Island of Palmas (Neth. v. U.S.)*, 2 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928).

<sup>54</sup> See generally Richard A. Falk, *Forward*, in *ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW* vi (Roland J. Stanger ed., 1962).

<sup>55</sup> John F. Murphy, *Force and Arms*, in 1 UNITED NATIONS LEGAL ORDER 247, 265 (Oscar Schachter & Christopher C. Joyner eds., 1995).

<sup>56</sup> JP 1-02, *supra* note 8, at 260.



military, economic, or political strength by using information and disinformation to create a psychological lacuna between the regime and its affected populations. For example, surrogates may be paid to spread rumors in local coffee shops and marketplaces about the corrupt practices of regime leaders.

There is no question that direct involvement in support of an insurrectional movement in another country amounts to intervention. However, as noted, the normatively and practically significant question is whether it rises to the level of a “threat or use of force.” Non-lethal activities (e.g., leadership training, organizational assistance, political or economic intelligence gathering, political subversion, or information operations) do not cross that threshold. Similarly, logistics support related solely to non-lethal activities (e.g., humanitarian aid) would not reach that level, at least so long as the state’s forces did not violate the territorial integrity of the target state in order to deliver material.

Providing lethal (“military”) training and logistical support, such as instruction on the use of weapons or transporting of rebel forces during operations, would, by contrast, be an unlawful use of force. The provision of arms would unquestionably qualify as such. This was the ICJ’s holding in *Nicaragua*, which involved U.S. support to insurgents known as the Contras. The Court stated that “the arming and training of the [C]ontras can certainly be said to involve the threat or use of force against Nicaragua.”<sup>57</sup>

As noted, the ICJ held that while the provision of training, logistical support, or weapons contravenes the prohibition on the use of force, it does not amount to an armed attack such that the target state may respond against the supporting state with force of its own pursuant to Article 51 of the UN Charter and customary law. This characterization is unacceptable to the United States, which, as discussed, recognizes no gap between the use of force and the armed attack thresholds; it considers all uses of force to be armed attacks.<sup>58</sup> Accordingly, by the U.S. position, once indirect,

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<sup>57</sup> *Nicaragua*, *supra* note 18, at ¶ 228.

<sup>58</sup> As discussed in greater length in our Conclusion, *infra*, this “fundamentalist” interpretation of the modern *jus ad bellum* served U.S. interests well throughout the Cold War as it delegitimized foreign-supported insurrections (e.g., communist revolutions), or other forms of proxy warfare, except as a defensive measure. Indeed, as early as the 1950s, the United States took the position that any interpretation of armed attack that respects state practice must include “an armed revolution which is fomented from abroad, aided and assisted from abroad.” See, e.g., U.S. Secretary of State John Foster Dulles’ argument that the provision of arms to rebels in Lebanon in 1958 constituted an armed attack justifying

unconventional activities qualify as a use of force, the right of self-defense is triggered; the target state would be entitled to employ force to defend itself, not only against the insurgents, but also against the supporting state. As Judge Stephen Schwebel detailed in his scathing dissent to the *Nicaragua* judgment, “the United States has consistently been among the most forceful advocates of [the] view that the use of armed groups by a State to carry out military activities against another State amounts to a use of force.”<sup>59</sup>

#### *D. Joint Operations*

Insurgencies or other armed resistance movements normally engage in some form of guerrilla warfare against the government.<sup>60</sup> Guerrilla warfare generally consists of attacks conducted in areas the rebels do not control and is typified by “hit-and-run” attacks by insurgents that do not wear uniforms or otherwise openly advertise their armed nature.<sup>61</sup> Beyond the external government involvement discussed above, participation

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the U.S. response under Article 51, *quoted in* Sofaer, *supra* note 45, at 422. Considerable support for the U.S. position can be found in customary international law. For example, in 1869, Spain seized the *Mary Lowell*, a U.S.-flagged vessel that was carrying military supplies to insurgents in Cuba; an international arbiter later found the seizure was justified on the grounds of self-defense as the “illegality” of delivering arms to “insurgents” forfeited protection of the U.S. flag. GEORG SCHWARZENBERGER, INTERNATIONAL LAW ASSOCIATION, REPORT ON SOME ASPECTS OF THE PRINCIPLE OF SELF-DEFENCE IN THE CHARTER OF THE UNITED NATIONS AND THE TOPICS COVERED BY THE DUBROVNIK RESOLUTION 21 (1958); C.H. Campbell v. Spain (Dec. 9, 1879), XXIX REP. OF INT’L ARBITRAL AWARDS 209, 210–11 (2012), [http://legal.un.org/riaa/cases/vol\\_XXIX/209-212.pdf](http://legal.un.org/riaa/cases/vol_XXIX/209-212.pdf) [<http://perma.cc/J9ST-72KL>].

<sup>59</sup> *Nicaragua*, *supra* note 18, at ¶ 234 (Schwebel, J., dissenting).

<sup>60</sup> Illustrative examples of successful guerrilla warfare include the Cossacks and peasant bands that broke Napoleon’s army in Russia, the operations of Spanish guerrillas or *partidas* during the Peninsular War, the Boer War, the Cuban revolts against Spain, the Philippine Insurrection, various North African operations against French and Spanish colonial rule, and the Spanish Civil War. R. Ernest Dupuy, *The Nature of Guerrilla Warfare*, 12 PAC. AFF. 138, 141 (June 1939). Some scholars suggest that modern guerrilla warfare originated out of necessity with the Irish Republican Army in 1917–1921, because after 1891 the “increasing sophistication of military technology made contests between regular armies and popular forces more unequal than before.” Charles Townshend, *The Irish Republican Army and the Development of Guerrilla Warfare 1916–1921*, 94 THE ENG. HIST. REV. 318, 319 (Apr. 1979).

<sup>61</sup> For example, when Umkhonto, the paramilitary wing of the African National Congress, initiated its guerrilla campaign against the apartheid government in South Africa in 1961, it “gave first priority to a campaign of sabotage against power and communication facilities and government buildings.” Sheridan Johns, *Obstacles to Guerrilla Warfare—A South African Case Study*, 11 J. AFR. STUD. 267, 273 (June 1973).

sometimes involves outside operational direction and control or even fighting alongside the insurgents. Indeed, the missions of U.S. Special Operations Forces include unconventional warfare, which involves “advising and assisting guerrilla forces to raid, ambush, sabotage, and otherwise interdict the adversary in ways designed to drain that hostile power’s morale and resources through military activities up to and including combat.”<sup>62</sup>

It is indisputable that once armed forces of a state engage in combat operations against those of another state, the armed attack threshold has been crossed. Recall that in *Nicaragua* the ICJ characterized “action by regular armed forces across an international border” as the paradigmatic illustration of an armed attack.<sup>63</sup> The reference to “regular” armed forces was meant not to distinguish them from Special Forces, but rather to indicate that they were the forces of another state.

With respect to the relationship between insurgent forces and an external state, the Court articulated the “sending by or on behalf of a State” standard mentioned *supra*. When the standard is met, military operations of the insurgent group in question may be treated as an armed attack by the external state. Caution is merited in applying the standard. Unconventional statecraft often involves some degree of external control and direction over insurgent forces, if only because the insurgent forces may rely on the state for funding, arms, intelligence, and other essential support. However, the threshold for attributing the group’s actions to the supporting state (as distinct from attributing responsibility to that state for its own actions in assisting the insurgents) is very high. After all, an armed attack opens the door to justifiable uses of force in response.

The ICJ did not expound on the threshold. However, it is reasonable to apply the state responsibility standard of effective control (discussed *infra*) by analogy in the sense that “sending by or on behalf” means the exercise of direction and control over all aspects of a group’s operations, not just a general degree of control over its activities. In other words, the group in question must *de facto* be an armed force available to the other state. In practical terms, a state has effective control over an insurgent group when it can direct the group to engage in operations it would otherwise not engage in or desist in those it would wish to conduct.

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<sup>62</sup> FM 3-05.130, *supra* note 49, at ¶¶ 5–31.

<sup>63</sup> *Nicaragua*, *supra* note 18, at ¶ 195.

Reflecting on the aforementioned discussions, the most recent edition of Oppenheim's classic international law treatise illustrates the approach of the Court and most commentators:

In light of the Court's judgment in [Nicaragua] it seems that action in support of opposition forces within another state may constitute intervention, even if the support is of non-military kind; if it has a military character but is limited to such indirect support as the supply of weapons or logistic support, it may constitute not only intervention but also an unlawful threat or use of force, but would not amount to an armed attack; and if it involves direct military action by the supporting state (whether on the part of its regular forces or through the dispatch of armed bands on a significant scale) it is in addition likely to constitute an armed attack . . . .<sup>64</sup>

Some commentators, as well as the United States, consider the distinction between "the dispatch by one State of armed bands into the territory of another State" (an act that would constitute an armed attack) and "the supply of arms and other support to such bands" (activities that "may" constitute an illegal use of force but not an armed attack) to be tortured.<sup>65</sup> That is the opinion of one of the authors of this Article. In the view of such critics, the ICJ's surgical distinction finds no support in state practice. For instance, just two years after the Charter was enacted, the United States denounced the foreign support provided to rebels in Greece in a statement to the UN Security Council:

In modern times, there are many ways in which force can be used by one State against the territorial integrity of another. Invasion by organized armies is not the only means for delivering an attack against a country's independence. Force is effectively used today

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<sup>64</sup> OPPENHEIM'S INTERNATIONAL LAW, VOL. I: PEACE 431–32 (Robert Jennings & Arthur Watts eds., 9th ed. 1992). Professor Thomas Franck framed the issue thus nearly twenty years before the *Nicaragua* decision:

No doubt a line of continuity runs from invasions by tanks and divisions through training, arming, sheltering and infiltrating neighboring insurgents, all the way down to hostile radio propaganda calling for revolution in a foreign country. However, these acts, while generically related, are also significantly dissimilar, and the law, if there is to be one, cannot simply ignore the differences.

Thomas M. Franck, *Who Killed Article 2(4)?*, 64 AM. J. INT'L L. 809, 813–14 (1970).

<sup>65</sup> *Nicaragua*, *supra* note 18, at ¶ 247.

through devious methods of infiltration, intimidation and subterfuge.<sup>66</sup>

Significantly, during the *Nicaragua* proceedings, both the United States and Nicaragua agreed that “a nation providing material, logistics support, training, and facilities to insurgent forces fighting against the government of another State is engaged in a use of force legally indistinguishable from conventional military operations by regular armed forces.”<sup>67</sup> In his dissent, Judge Schwebel cited “ample and significant” state practice in support of this principle.<sup>68</sup>

#### IV. Unconventional Statecraft and the Law of State Responsibility

Pursuant to the law of state responsibility, a state bears “responsibility” for any internationally wrongful acts attributable to it.<sup>69</sup> When a state is responsible for an internationally wrongful act, an “injured State” may demand cessation and (or) reparations.<sup>70</sup> It may also take countermeasures.<sup>71</sup> Countermeasures are state actions or omissions directed at the offending state that would otherwise violate an obligation owed to that state. They are designed to compel the offending state into compliance with international law.<sup>72</sup> To the extent that unconventional statecraft

<sup>66</sup> 2 U.N. SCOR (147th and 148th mtg.), 1120–21 (1947) as quoted in *Nicaragua*, *supra* note 18, at ¶ 235 (Schwebel, J., dissenting).

<sup>67</sup> *Nicaragua*, *supra* note 18, at ¶ 158 (Schwebel, J., dissenting) (citation omitted).

<sup>68</sup> *Id.* ¶ 219.

<sup>69</sup> *Articles on State Responsibility*, *supra* note 41, at art. 1. The ICJ has recognized this principle of international law. *Corfu Channel*, *supra* note 19, at 23; *Nicaragua*, *supra* note 18, at ¶¶ 283, 292; *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7, ¶ 47 (Sept. 25). The Permanent Court of International Justice enunciated the same principle earlier. *See, e.g.*, *Phosphates in Morocco* (It. v. Fr.), Preliminary Objections, 1938 P.C.I.J. (ser. A/B), No. 74, at 10, 28 (June 14); *Case of the S.S. “Wimbledon”* (U.K., Fr., It. & Jap.), 1923 P.C.I.J. (ser. A) No. 1, at 15, 30 (Aug. 17); *Factory at Chorzow* (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9, at 3, 29–30 (July 26).

<sup>70</sup> *Articles on State Responsibility*, *supra* note 41, arts. 30–31, 34–37, 42, 48(1). Reparations may take the form of restitution, compensation, and satisfaction. *Id.* art. 34. Restitution involves the reestablishment of the situation that existed prior to the internationally wrongful act. *Id.* art. 35. Compensation involves financial payment for damage incurred by the internationally wrongful act to the extent that the damage is not made good by restitution. *Id.* art. 36(1). Satisfaction consists of “an acknowledgment of the breach, an expression of regret, a formal apology or other appropriate modality.” *Id.* art. 37(2).

<sup>71</sup> *Id.* arts. 22, 50–54.

<sup>72</sup> *Gabcikovo-Nagymaros Project*, *supra* note 69, at ¶¶ 82–83; *Nicaragua*, *supra* note 18, at ¶ 249; *see* *Responsabilité de l’Allemagne à raison des dommages causés dans les colonies portugaises du sud de l’Afrique (“Naulilaa”)* (Port. v. Ger.), II R.I.A.A. 1011, 1025–26

violates international law, the injured state may avail itself of these state responsibility remedies. For instance, if one state engages in unconventional statecraft that amounts to wrongful intervention, the target state may respond with proportionate actions of its own that would otherwise violate that (or another) norm.

Only actions that are legally attributable to the state engaged in the unconventional statecraft open the door to such remedies. Attribution is clearest when state organs, such as the Special Forces or intelligence agencies, engage in the activities.<sup>73</sup> In fact, the state bears responsibility even when those activities are *ultra vires*, that is, unauthorized.<sup>74</sup>

Attribution also results when one state assists in the commission of an internationally wrongful act by another, at least so long as it is aware of the circumstances surrounding the act.<sup>75</sup> As an example, if state A provides airlift or intelligence for state B's unconventional statecraft activities that qualify as a use of force, state A will bear responsibility for state B's actions. Similarly, if state A provides funding for the purchase of arms that are subsequently delivered by state B to insurgents in state C, the wrongful conduct of state B will be attributable to state A. In such a case, state A's assistance to state B must constitute an integral component of the operation before attribution attaches. For instance, state A's general financial support to state B's program to undermine the government of state C would not render it liable for the transfer of weapons to insurgents that were purchased without the knowledge or intent of state A.<sup>76</sup>

In relation to unconventional statecraft, most significant is the attribution of the acts of individuals or groups opposing a foreign government. Article 8 of the Articles on State Responsibility, the International Law Commission's authoritative restatement of that body of

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(1928); *Responsabilité de l'Allemagne en raison des actes commis postérieurement au 31 juillet 1914 et avant que le Portugal ne participât à la guerre* ("Cysne"), (Port. v. Ger.), II R.I.A.A. 1035, 1052 (1930); *Air Services Agreement of 27 March 1946* (U.S. v. Fr.), XVIII R.I.A.A. 416, 443–46 (1979).

<sup>73</sup> *Articles on State Responsibility*, *supra* note 41, at art. 4(1).

<sup>74</sup> *Id.* art. 7.

<sup>75</sup> *Id.* art. 16. A state will also bear responsibility for another state's internationally wrongful unconventional statecraft when the former directs and controls the latter's commission of the operation. *Id.* art. 17. Such situations are unlikely, for states are seldom in sufficient control (as distinct from influence) of another state for the rule of attribution to apply. One exception suggested by recent events is belligerent occupation.

<sup>76</sup> JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 151 (2002).

law, provides that “[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”<sup>77</sup> The conduct is “attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation.”<sup>78</sup> Incidental or peripheral association does not warrant attribution. Additionally, unlike the activities of state organs, attribution based on direction and control does not occur in the case of *ultra vires* acts.<sup>79</sup>

The precise threshold of control that generates attribution is unclear. In the *Nicaragua* case, the ICJ considered the responsibility of the United States for acts committed by the Contra insurgents it supported against the Government of Nicaragua. The Court held that

[a]ll the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.<sup>80</sup>

In its *Genocide* judgment,<sup>81</sup> the ICJ clarified the notion of effective control by distinguishing it from the “overall control test” enunciated by the International Criminal Tribunal for the former Yugoslavia (ICTY) in

<sup>77</sup> *Articles on State Responsibility*, *supra* note 41, at art. 8. The “on the instructions” situation refers to the recruitment or instigation of a group of private individuals by a state to operate as its auxiliary without being specifically commissioned to do so pursuant to the domestic legal regime, as with a group of volunteers who conduct cyber operations on behalf of a state. The notion is generally inapplicable to unconventional statecraft operations.

<sup>78</sup> CRAWFORD, *supra* note 76, at 110.

<sup>79</sup> *Id.* at 113.

<sup>80</sup> *Nicaragua*, *supra* note 18, at ¶ 115.

<sup>81</sup> Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 108, ¶¶ 403–05 (Feb. 26).

*Tadić*.<sup>82</sup> *Tadić* involved the issue of classification of conflict, not the *jus ad bellum*. The ICJ confirmed in the *Genocide* case that this latter level of control was insufficient for state responsibility purposes. Instead, the state concerned must exercise control over specific operations before the conduct of an insurgent group is attributable to it. For instance, merely providing financial or other support would not suffice, although it might qualify as intervention.

## V. Unconventional Statecraft and Armed Conflict

Whenever an armed conflict is initiated as a matter of law, the *lex specialis* of international humanitarian law governs the activities of the parties thereto. The existence of an armed conflict is highly significant because international humanitarian law imposes restrictions and prohibitions on how hostilities may be conducted and affords certain groups and objects special protection from their effects. Armed conflict exists in two guises: (1) an international armed conflict between states and (2) a non-international armed conflict between a state and a non-state organized armed group (or between two such groups). The law governing them differs to an extent, with that applying to international armed conflict being far more robust.

If unconventional statecraft involves “hostilities” between the forces of the two states involved, it is incontrovertible that an international armed conflict is underway. A minor controversy exists over the level of hostilities needed to trigger an international armed conflict, but it is clear that anything beyond a *de minimus* exchange suffices.<sup>83</sup> It makes no difference whether the state forces engaging in the unconventional statecraft are operating on their own or jointly with insurgents. In the latter case, the degree of control

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<sup>82</sup> Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment ¶¶ 117, 131–40, 145 (Int’l Crim. Trib. for the former Yugoslavia July 15, 1999) [hereinafter *Tadić*].

<sup>83</sup> The authors agree with the position set forth in the ICRC Commentaries to the 1949 Geneva Conventions that “[a]ny difference arising between two States and leading to the intervention of armed forces is an armed conflict.” COMMENTARY TO GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD 32 (Jean Pictet ed., 1952); COMMENTARY TO GENEVA CONVENTION II FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED, SICK, AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA 28 (Jean Pictet ed., 1960); COMMENTARY TO GENEVA CONVENTION III RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 23 (Jean de Preux ed., 1960); COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 20 (Oscar M. Uhler & Henri Coursier eds., 1958).



that the forces exercise over the insurgents, if any, is irrelevant to the existence of an international armed conflict.

A situation in which unconventional statecraft involves no combat action by the state's forces is somewhat more complex. In a widely accepted finding in the *Tadić* case, the ICTY's Appeals Chamber held that non-international armed conflicts are internationalized when an external state exercises "overall control" of a rebel group. Although the control need not reach the effective control level cited *supra* in the context of state responsibility, it "must comprise more than the mere provision of financial assistance or military equipment or training."<sup>84</sup> An international armed conflict between the respective states is initiated only when the state engaged in unconventional statecraft exercises sufficient control over the insurgents to generally direct their activities.

### Conclusion

Unconventional statecraft will continue to be ubiquitous in the decades ahead, just as it was in the days immediately following the signing of the U.N. Charter. The progress of humankind towards achieving greater freedom and self-determination, fed by the global connectivity of our information age, guarantees that subjugated people everywhere will continue to rise up against oppressive governments—and the enemies of those repressive governments will continue to aid the insurgents, irrespective of international law concerns. In light of current events, it may be an opportune moment for the United States, with unconventional statecraft indelibly etched in its DNA,<sup>85</sup> to reassess its long-standing legal analysis of unconventional statecraft.

The United States has consistently interpreted the U.N. Charter to ban nearly all foreign support to insurgencies, believing that any assistance beyond non-discriminate humanitarian aid would constitute a use of force in violation of Article 2(4). Yet, this fundamentalist approach, while understandable in the context of the Cold War and the spread of communism, arguably lacks salience in the twenty-first century and runs counter to much state practice.

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<sup>84</sup> *Tadić*, *supra* note 82, at ¶ 137.

<sup>85</sup> The American victory in its War of Independence "would not have been possible" without French assistance, which included 90% of all gunpowder used by the American forces. BOOT, *supra* note 4, at 77–79.

U.S. President Harry Truman signed the United Nations Charter on August 8, 1945. Less than two years later, he delivered his celebrated speech to a joint session of Congress outlining the Truman Doctrine, which is generally considered the start of the Cold War.<sup>86</sup> What is often forgotten with the passage of nearly seventy years is that Truman's speech promised support to the governments of Greece and Turkey, which were battling insurgent flames fanned by the Soviet Union. Truman noted that the "very existence" of Greece was "threatened by the terrorist activities of several thousand armed men, led by Communists" in defiance of a democratic government that garnered 85% of the vote in the previous election. In the face of this threat, Truman declared:

At the present moment in world history nearly every nation must choose between alternative ways of life. The choice is too often not a free one. One way of life is based upon the will of the majority, and is distinguished by free institutions, representative government, free elections, guarantees of individual liberty, freedom of speech and religion, and freedom from political oppression. The second way of life is based upon the will of a minority forcibly imposed upon the majority. It relies upon terror and oppression, a controlled press and radio, fixed elections, and the suppression of personal freedoms . . . .

The seeds of totalitarian regimes are nurtured by misery and want. They spread and grow in the evil soil of poverty and strife. They reach their full growth when the hope of a people for a better life has died. We must keep that hope alive. The free peoples of the world look to us for support in maintaining their freedoms.<sup>87</sup>

The Truman Doctrine ushered in the Cold War and the U.S. strategy of containment of the Soviet Union. To U.S. policymakers, it was "quite clear" that the Soviet Union sought "to bring the free world under its dominion by the methods of the cold war" and their "preferred technique [was] to subvert by infiltration and intimidation."<sup>88</sup>

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<sup>86</sup> Harry S. Truman, Special Message to Congress on Greece and Turkey: The Truman Doctrine, Pub. Papers 176 (1963), <http://trumanlibrary.org/publicpapers/index.php?pid=2189&st&st1> [<http://perma.cc/BPD6-WS8N>].

<sup>87</sup> *Id.*

<sup>88</sup> THE EXECUTIVE SECRETARY ON UNITED STATES OBJECTIVES AND PROGRAMS FOR NATIONAL SECURITY, NSC 68, A REPORT TO THE NATIONAL SECURITY COUNCIL 34 (Apr. 14, 1950),

In this historical context, it becomes apparent why the United States interpreted Article 2(4) in a manner designed to preserve strictly the status quo. As the Soviet Union sought to expand its sphere of influence, its policy was to foment internal insurrection designed to lead to the establishment of communist governments aligned with the Soviet Union. By deeming any such Soviet assistance to foreign insurgencies to be a violation of Article 2(4), the United States could justify its countering actions as acts of collective self-defense. On the other hand, any activities conducted by the United States in support of foreign insurgencies against communist governments would simply be conducted covertly such that the role of the U.S. government would never be publicly acknowledged and, therefore, no public legal justification would be necessary. In short, the U.S. legal position on foreign support to insurgencies was designed to enable public condemnations of Soviet meddling, knowing that any analogous U.S. activities would be conducted covertly—and covert action directed by the President under his U.S. constitutional authorities need not comply with the U.N. Charter.<sup>89</sup>

Seeming hypocrisy aside, there is an inherent tension between the fundamentalist U.S. interpretation of Article 2(4) in the context of foreign support to insurgencies and its policy imperative of supporting democracy and self-determination. This was evidenced in 2012 during debates over the legality of providing assistance to anti-Assad rebels in Syria, where the moral and policy imperatives seemed to demand assisting the rebels while the lawyers cautioned that such actions could violate Article 2(4).<sup>90</sup>

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[http://www.trumanlibrary.org/whistlestop/study\\_collections/coldwar/documents/pdf/10-1.pdf](http://www.trumanlibrary.org/whistlestop/study_collections/coldwar/documents/pdf/10-1.pdf) [<http://perma.cc/CRQ4-RBBU>].

<sup>89</sup> *Medellín v. Texas*, 552 U.S. 491 (2008) (holding non-self-executing treaties, including the U.N. Charter, are not enforceable in U.S. courts unless implemented into law by Congress); Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities (June 21, 1989), 13 Op. O.L.C. 163, 179 (finding that Article 2(4) is non-self-executing and therefore under domestic law the President may authorize actions inconsistent therewith); see Robert J. Delahunty & John Yoo, *Executive Power v. International Law*, 30 HARV. J. L. & PUB. POL'Y 73, 76 (2007) (“the Constitution does not forbid Presidents from taking action under their constitutional powers that run counter to rules of international law”).

<sup>90</sup> See, e.g., debating blog posts between Jack Goldsmith on *Lawfare* and Marty Lederman on *Opinio Juris*. Jack Goldsmith, *Marty Lederman on the President's Syria Press Conference, and a Brief Response*, LAWFARE (Sept. 5, 2013), <http://www.lawfareblog.com/2013/09/marty-lederman-on-the-presidents-syria-press-conference-and-a-brief-response/> [<http://perma.cc/WKC6-2T46>]; Marty Lederman, *Syria Insta-Symposium: Marty Lederman Part I—The Constitution, the Charter, and Their Intersection*, OPINIO JURIS (Sept. 1, 2013), <http://opiniojuris.org/2013/09/01/syria-insta->

But the law-and-policy tensions and apparent duplicity is not unprecedented. In 1961, the United States sought ways to support insurgents seeking to overthrow President Rafael Leonidas Trujillo of the Dominican Republic. The insurgents requested sniper rifles and other military equipment, yet U.S. intelligence agents assessed that the insurgents lacked the capability for effective revolution and, presumably, the State Department determined that providing such weapons would constitute a violation of Article 2(4). Accordingly, the United States refused to supply military arms, such as explosives, machine guns, and sniper rifles; however, small arms such as pistols and carbines were apparently supplied to the insurgents, in the words of a State Department memo, as “personal defense weapons attendant to their projected efforts to *neutralize* Trujillo.”<sup>91</sup> Trujillo was a brutal dictator who reportedly plundered over \$800 million from his country and killed thousands of political opponents, so in the end the lawyers apparently found a creative loophole and the assassination weapon may have been delivered by diplomatic pouch.<sup>92</sup>

Our analysis of the international law of unconventional Statecraft seeks to provide normative clarity to the question of what foreign support to insurgents—from non-discriminatory humanitarian aid to jointly conducted operations—is permissible. Unfortunately, it is hampered by the inherently opaque nature of foreign support to insurgencies and the related paucity of *opinio juris* on this issue; it is impossible, after all, to assess the underlying legal justification for unacknowledged activities. Nevertheless, our analysis suggests the following categorization of support and concomitant legal status:

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symposium-marty-lederman-part-constitution-charter-intersection/ [http://perma.cc/ET5-R24H].

<sup>91</sup> W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION 58 (1992) (citations omitted).

<sup>92</sup> *Id.* at 57–59.

Category 1	Non-Discriminatory Humanitarian Aid (food, medical supplies, tents/temporary shelter, non-military vehicles & communications equipment)	<i>Not</i> Intervention
		<i>Not</i> Use of Force
		<i>Not</i> Armed Attack
Category 2	Targeted/Discriminate Humanitarian Aid, Funding, Intelligence, Non-Lethal Assistance (leadership/organizational training, political subversion, information operations, logistics, etc.)	Intervention
		<i>Not</i> Use of Force
		<i>Not</i> Armed Attack
Category 3	Targeting Intelligence, Materiel (military arms, vehicles, and communications equipment), Lethal Training, Operational Logistics Support	Intervention
		Use of Force
		<i>Not</i> Armed Attack
Category 4	Joint Operations (including “effective control”)	Intervention
		Use of Force
		Armed Attack

**Fig. 2 Legality of Rebel Support**

These categories clearly assume a gap between Article 2(4) and Article 51 such that not every illegal use of force constitutes an armed attack justifying a response in self-defense—a gap that the ICJ and most states accept. If one rejects the view that there is a gap between 2(4) and 51, as do the United States and one of the present authors, then Categories 3 and 4 would simply be merged and any of the activities within both categories would constitute an armed attack.

Understanding that assessments of the legality of foreign-insurgent support are inherently contextual and value-driven, we acknowledge that the framework suggested above may appear overly rigid. It is, however, not offered to constrain hard policy choice, but rather to inform it. Unconventional statecraft is most effective when the domestic and international communities perceive it as lawful. The risk of its not being seen as such is a crucial factor in any mature policy deliberation, not only because its characterization as unlawful may open the legal door to certain responses on the part of the target state and its allies, but also because broader support and respect for the state engaging in the unconventional statecraft may erode. In other words, perceptions of unlawfulness can spawn negative reverberating effects throughout the international and domestic security environment in which a state operates. Perhaps as

importantly, commitment to the international rule of law is a fundamental hallmark of value-driven participation in the global political system, a point on which states considering unconventional statecraft beyond the margins of the law should carefully reflect.